89-145

Supreme Court, U.S.
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CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE TEXAS FRUIT PALACE, INC.,
Petitioner

v.

HONORABLE WILLIAM M. STEGER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILLY H. GRAGG
P. O. Box 678
Palestine, Texas 75801
(214) 729-7333
Counsel of Record

RICHARD BROOKS HARDEE
Rt. 8, Hardee Bldg.
Hwy. 155, South
Tyler, Texas 75703
(214) 581-5220
Counsel for Petitioner

J. CHRISTOPHER KOLSTAD
P. O. Box 1668
Palestine, Texas 75802
(214) 723-3650
Counsel for Petitioner

July 1989

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

64-80

QUESTION PRESENTED

Where the U.S.P.S., a third party defendant in a quiet title action, removes the case to United States District Court, does the grant of exclusive jurisdiction [28 U.S.C., Sec. 1346(f)] for quiet title action (28 U.S.C., Sec. 2409a) permit severance and remand of all non federal parties, to state court for a determination of the title, through which the federal parties claim?

LIST OF PARTIES AND RULE 28.1 LIST

List of Parties

The parties at interest are The Texas Fruit Palace, Inc. (T.F.P.), who was defendant in the trial court; the City of Palestine, Texas (City), which was plaintiff in the trial court; and the United States Postal Service (U.S.P.S.) and the United States of America (U.S.A.) which were third party defendants.

Rule 28.1 List (Statement)

Petitioner, The Texas Fruit Palace, Inc., is a non-profit corporation which has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE TEXAS FRUIT PALACE, INC.,
Petitioner

v.

HONORABLE WILLIAM M. STEGER,
U.S. DISTRICT JUDGE FOR THE
EASTERN DISTRICT OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW, The Texas Fruit Palace, Inc., through the undersigned attorneys and respectfully petitions this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, toward the end that it act favorably on the Writ of Certiorari filed therein.

OPINIONS BELOW

No opinions were issued by the courts below. An order was issued on the 13th day of April, 1989, by the Honorable District Court of the Eastern District of Texas, Tyler Division, the Honorable Wm. M. Steger, presiding, which severed and remanded to state court all non-federal parties in an action to quiet title brought under 28 U.S.C. §§ 1346(f) and 2409a. (The Quiet Title Act). Appendix I. An order denying a motion for reconsideration by the district court appears as Appendix III.

An order denying a Writ of Mandamus sought of the Court of Appeals for the Fifth Circuit is set forth in Appendix V, and an order denying a request for reconsideration of said motion is set forth in Appendix VII.

JURISDICTION

Jurisdiction for Writ of Certiorari is invoked pursuant to 28 U.S.C. §§ 1254(1), 1651 and grows out of the action of the Court of Appeals for the Fifth Circuit in denying the motion of petitioner for Writ of Mandamus, such denial being dated the 27th day of April, 1989, and the action of said Court in denying motion of petitioner for reconsideration dated the 15th of May 1989.

In addition to the jurisdictional grounds set forth above petitioner further relies on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

STATUTES INVOLVED

28 U.S.C. § 1346(f), 28 U.S.C.S. § 1346(f) (1988)

> (f) The district courts shall have exclusive original jurisdiction of civil action under section 2409a [28 U.S.C.S § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C. § 2409a(a), 28 U.S.C.S. 2409a(a) (1977)

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [28 U.S.C.S. §§ 1346, 1347, 1491, or 2410], sections 7424, 7425, and 7426, [26 U.S.C.S. §§ 7424, 7425, and 7426], or section 208 of the Act of July 10, 1952 (43 U.S.C. § 666) [43 U.S.C.S. § 666].

STATEMENT OF THE CASE

T.F.P. is the record holder of a long term lease on premises owned by the City on which T.F.P., pursuant to the terms of such lease, operates the annual county fair. The initial lease was executed in 1947 for a term of 50 years, but in 1952 it was extended for 10 years, giving it an expiration date of 2007.[1]

In 1980 the City filed a state court action alleging that the lease had been breached and was therefore cancelled. The litigation in state court, after various hearings and appeals, was still pending in 1987 when the City announced that it was going to institute eminent domain proceedings to condemn the lease in order to convey a portion of the premises to U.S.P.S. for a post office.

T.F.P. immediately sought an injunction from the United States District Court for the Eastern District of Texas at Tyler on the ground that under the Constitution of the United States, as interpreted by various court decisions, the federal government had a monopoly on the postal function and therefore state and municipal governments were proscribed from exercising any authority relating thereto. The court (the Honorable William Wayne Justice sitting) exercised its discretion to abstain, but issued a formal and rather detailed order. Appendix IX.

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1. These instruments are not relevant to this writ, but would have been included in the appendix for informational purposes but for the fact, as is explained in the text, petitioner was not permitted to introduce any evidence.

The City then formally commenced its proceedings in eminent domain and T.F.P. responded by filing its objection to the condemnation alleging it to be illegal on multiple grounds. The City subsequently conveyed a portion of the premises to U.S.P.S. which had actual knowledge of both law suits.

Almost immediately after the conveyance to U.S.P.S. the two suits were consolidated in the state court and T.F.P. then joined U.S.P.S. as a necessary party. U.S.P.S. duly removed the case to the Federal District Court for the Eastern District of Texas, pursuant to 28 U.S.C. § 144(a) and 39 U.S.C. § 409. The United States of America (U.S.A.) was joined.[2]

The trial began before Honorable William M. Steger. Since the initial burden of proof was on the City as to all matters it commenced its case by placing in evidence the matters requisite to a valid condemnation, which was a necessary predicate to the title of U.S.P.S. and U.S.A.[3]

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2. These matters are reflected in the most recent pleadings of petitioner. Appendix IX.

3. It is to be noted that the purported condemnation was under Texas law. Under such law title does not pass (if at all) until there is a final resolution of the condemnation dispute. *City of Paris v. Tucker*, 104 S.W. 1016 (1915), *inter alia*. Although the Texas Condemnation Rule on title has not been challenged, it is noteworthy that Judge Justice recognized this doctrine in the order which he issued. Appendix IX, p. 46a.

When the City rested, the court sua sponte stated that it would retain jurisdiction over the U.S.A. and U.S.P.S. but was remanding all other parties to the state court. The order of the court was entered the 13th day of April, 1989. (Appendix I). This, despite the fact that the title of U.S.A. and U.S.P.S. will be dependent upon the outcome of the remanded cause, and despite the fact that T.F.P. was not afforded an opportunity to offer any evidence in support of its claim that the condemnation was invalid.

T.F.P. filed a motion with the federal district court seeking reconsideration of its action. Appendix II. This was denied. Appendix III. It also filed a petition for a Writ of Mandamus with the Court of Appeals for the Fifth Circuit. Appendix IV. This motion was denied without opinion. Appendix V. A Motion for Rehearing of the Petition for Writ of Mandamus was then filed. Appendix VI. This was also denied. Appendix VII. The relief was, and is, being sought due to the fact that petitioners are unable to discern any avenue of appeal.

REASONS FOR GRANTING A WRIT

1. The United States District Court severed a quiet title civil action over which it had exclusive jurisdiction under 28 U.S.C., Sections 2409a and 1346f and remanded the non-federal parties to state court while retaining jurisdiction over federal parties. *Key v. Wise,* 629 F.2d 1049 (5th Cir. 1980), *cert. denied,* 545 U.S. 1103 (1981).

2. The United States claims an interest in the title and is a necessary party to the action under Texas law. Inasmuch as exclusive jurisdiction is reserved to federal courts by 28 U.S.C., Section 2409a (The Quiet Title Act), the state court quiet title cause of action is subject to dismissal for lack of jurisdiction.

3. The United States will be bound by the state court's decision regarding title to land in which the U. S. claims an interest under the doctrines of res judicata and collateral estoppel although the United States is not a party to the state court proceeding. *Key v. Wise,* supra, at 1061.

4. Once the matter is removed from federal court a state court would be called upon to pass upon the question of whether or not it is free to ignore § 1346(f). This is an abdication of federal authority over the interpretation of § 1346(f) and the Quiet Title Act. A failure to intervene in the remand and severance order is, therefore, to remove the matter from the jurisdiction of the federal judiciary, including this Honorable Tribunal.

5. A failure to intervene in this cause will constitute a de facto grant of discretion to the federal district court

for any quiet title action. Such court could elect to sever and send to state court any three party quiet title action irrespective of the clear and unequivocal language of § 1346(f) to the contrary. This is true because the misapplication of the law cannot be corrected by appeal (it is interlocutory); and it cannot be corrected effectively by a state court (because it would be granting to the state courts the power to interpret federal statutes on matters that are exclusively federal). The only possible mechanism for effectuating the intent of Congress is therefore by the granting the extraordinary writ for which petitioner prays.

6. The principal reason for an appellate court's not acting on rulings that are interlocutory in nature is to avoid piecemeal litigation. Such reason is not served in the instant cause. It is defeated.

The remand to state court means a trial in that system. Should petitioner prevail it is almost a certainty that the adverse Federal Parties will seek to overturn the res judicata holding of *Key* when petitioners seek to use it as grounds for a summary judgment in the federal district court where jurisdiction is being retained over such parties. This means a second trial where one will do. It is conceivable that it could entail even a third trial pursuant to 28 U.S.C. § 1292(b). This is due to the fact that should the trial court rule that the res judicata question involves a controlling question of law, as it most certainly appears to do, that controlling question could be appealed while a potential third suit awaited in trial court its determination.

SUMMARY

There appears little problem or doubt in a two-party action, where A and the United States alone are in a title dispute. The problem in *Key*, and so far in this cause, seems occasioned by the introduction of B, a third party upon whose title that of the United States depends.

The Honorable Judge of the Mississippi Federal Court felt that the controversy between A and B was a traditional state court title suit controlled by state law, and that it was appropriate to let the litigation proceed in the traditional way before a traditional state court, irrespective of the interest of the United States in the outcome of that litigation. The honorable trial judge in the instant cause apparently reached essentially the same conclusion.

The failure to apply § 1346(f) whether there are two parties or three not only yields a result inconsistent with the intent of Congress, but inconsistent with fundamental concepts of real property litigation. It is believed to be universally recognized in our legal system that all parties necessary for the determination of title should be before a single forum if jurisdiction can possibly be obtained. Indeed, their presence is sometimes deemed so indispensable that the proceeding cannot go forward in their absence.

The Quiet Title Act is first and foremost jurisdictional in nature. It opens the courthouse doors that previously were closed, because of sovereign immunity. All that § 1346(f) does is to require that those doors be to the federal courthouse. It in no wise modifies or abrogates the fundamental and innately sensible principle that all

parties in a dispute of this type should go through those same doors and stand before the same court at the same time. Clearly all parties necessary for the determination of title should be before a single forum if jurisdiction can possibly be obtained.

Petitioner has done all it can do. It has asked the trial court to reconsider its order. It has asked the Court of Appeals for mandamus. When that request was denied it asked that court to reconsider its action. That request was also denied.

We respectfully submit that the *Key* scenario should not be permitted to re-occur. Although it is recognized that the failure of this court to grant certiorari is not to be construed as an expression by the court of its view on the substantive law, it is submitted that in this instance such failure can only further ingrain the holding of *Key* which is pregnant with mischief. That mischief effectuates, among other things, a patent misapplication of important congressional enactments and fails to recognize some quite basic concepts relating to those who should be joined in an action to quiet title.

CONCLUSION

The set of circumstances that gave rise to the *Key* decision should not be permitted to re-occur. The only way to prevent this is for the federal district court to retain its exclusive jurisdiction over the entire case. Inasmuch as no avenue of appeal appears available to the action of the federal district court ordering severance and remand, the only mode of correcting the matter and preventing further entrenchment of *Key* is for this Honorable Tribunal to vacate the act of the Court of Appeals

dismissing petitioner's Writ of Mandamus or conceivably to treat this as a direct request for the same.

Respectfully submitted,

BILLY H. GRAGG
P. O. Box 678
Palestine, Texas 75802
214/729-7333
TBN NO. 08253000

RICHARD BROOKS HARDEE
Rt. 8, Hardee Bldg.
Hwy. 155, South
Tyler, Texas 75703
214/581-5220
TBN NO. 08952000

J. CHRISTOPHER KOLSTAD
P. O. Box 1668
Palestine, Texas 75802
214/723-3650
TBN NO. 11669500

Attorneys For The Texas Fruit Palace, Inc.

APPENDIX I

Order of United States District Court for the Eastern District of Texas, Tyler Division of April 13, 1989, severing and remanding certain parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-88-106-CA

THE CITY OF PALESTINE, TEXAS

v.

THE TEXAS FRUIT PALACE, INC.

v.

THE UNITED STATES POSTAL SERVICE
and UNITED STATES OF AMERICA

(Filed April 13, 1989)

ORDER

The Court hereby issues the following to reflect the Court's oral order of April 11, 1989, in the above-styled and numbered action.

The Court hereby withdraws the above-styled and numbered action from the jury. The action between the Texas Fruit Palace, Incorporated ("TFP") and the United States Postal Service ("USPS") and United States of America ("USA") is severed from the above-styled and numbered action, pending a disposition in the state

district court of Anderson County, Texas, of the action between the City of Palestine, Texas ("City"), and the TFP involving, among other state law issues, the issue of eminent domain. The Court finds that it lacks jurisdiction over the severed action between the Ctiy and the TFP and, therefore, remands that action pursuant to 28 U.S.C. § 1447(c). All issues between the TFP and the USPS and USA are issues to be decided by this Court and this Court will reserve its ruling on these issues pending the resolution of the issues between the City and the TFP. It is, therefore,

ORDERED that the action between the City and the TFP be and hereby is SEVERED from the action between the TFP and the USPS and USA. It is further

ORDERED that the action between the City of Palestine, Texas, and the Texas Fruit Palace be and hereby is REMANDED to the Third District Court of Anderson County, Texas. A certified copy of this order shall be mailed by the Clerk of this Court to the Clerk of the State Court. The State Court may thereupon proceed with such case.

SIGNED this 13th day of April, 1989.

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX II

Motion for Reconsideration (to the Federal District Court).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-88-106-CA

CITY OF PALESTINE

v.

THE TEXAS FRUIT PALACE, INC.

v.

THE UNITED STATES POSTAL SERVICE
AND UNITED STATES OF AMERICA

(Filed April 24, 1989)

MOTION FOR RECONSIDERATION

Comes now the Defendant, Texas Fruit Palace (TFP) and moves that the Court reconsider its Order signed on the 13th day of April, 1989, that the captioned cause in which the City of Palestine (City) was Plaintiff and TFP is Defendant, and the United States Postal Service (UPSP) and the United States of America (USA) are third party Defendants would be severed and remand to State Court as to the City and TFP.

TFP would respectively move the court to reconsider such order based on the facts and law:

I.

FACTUAL BACKGROUND

The City filed suit in 1981 against Texas Fruit Palace alleging that the Texas Fruit Palace had breached a long term lease under which it operated the County Fair on land owned by the City.* Both parties filed for summary judgment. The Trial Courts granted the motion of TFP and denied that of the City. TFP appealed. The Supreme Court declined to hear the matter.

The matter was set for trial in 1987, when the City passed a resolution that it was condemning the property in order to convey it to USPS for a post office. TFP objected on constitutional grounds by seeking an injunction in the Federal Court for the Eastern District of Texas. The Honorable William Wayne Justice declined to exercise jurisdiction. The City passed a second resolution stating that the condemnation was to convey a portion of the land to the United States Postal Service and to utilize the rest for certain enumerated City needs. It is believed that this was an attempt to circumvent TFP's constitutional objections.

The City instituted its proceedings in condemnation. TFP responded by alleging that the condemnation was void and illegal because:

1. The condemnation was made in bad faith, being but a subterfuge to oust TFP from a lease it had been unable to break.

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* This was actually the second time the City had sought to declare the lease invalid for the same alleged breach. The first time was in 1978. The parties resolved the matter in 1979.

2. It was contrary to the constitution of the United States under certain decisions of other States and *Kohl v. U.S.*, 91 U.S. 367, 23 L.Ed. 449.

3. The City did not have the funds with which to fund the condemnation as required by law.

4. TFP was actually fulfilling a public purpose and there was no determination as to whether the existing or proposed public use was superior as required by law.

Despite the fact that USPS had actual notice of the two suits against the City they took a deed to approximately half of the premises paying a recited consideration of two hundred and twenty-six thousand four hundred and fifty-eight ($226,458.00) dollars. The condemnation commissioners had appraised the value of TFP lease at one hundred and sixty thousand ($160,000.00) dollars. This gave the City approximately half the land with valuable improvements and a profit of just over sixty-six thousand ($66,000.00) dollars.

TFP and the City jointly moved that the suit involving the lease controversy and the condemnation suit be joined, which motion was granted. TFP then joined USPS as a necessary party. Their title of course was (and is) dependent on the outcome of the suits between the City and TFP. When USPS was joined they immediately filed for removal.

II.

RELIEF SOUGHT

It is respectfully submitted that the remand of a portion of the case to the State Court system would work to the

material disadvantage of TFP due to the disparity of resource between this small non-profit community fair compared to those of the City and Federal Government.

Furthermore such removal would seem contrary to the mandates of Rule 19(a) FRCP and 28 U.S.C. § 2409a which gives the Federal Courts *exclusive* jurisdiction over the entire case, and case law.

WHEREFORE, TFP based upon the fact and the law respectfully moves the court to reconsider the announcement of severance and remand made in open court and withdraw the same.

Respectfully Submitted:

/s/ BILLY H. GRAGG
Billy H. Gragg
P. O. Box 678
Palestine, TX 75802
(214) 729-7333
State Bar No. 08253000

/s/ RICHARD BROOKS HARDEE
Richard Brooks Hardee
Rt. 8, Hardee Bldg.
Hwy 155, South
Tyler, TX 75703
(214) 581-5220
State Bar No. 08952000

/s/ CHRISTOPHER J. KOLSTAD
Christopher J. Kolstad
P. O. Box 1668
Palestine, TX 75802
(214) 723-3650
State Bar No. 11669500

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration has been mailed by United States Mail, postage paid on the 24th day of April, 1989 addressed as follows:

Ms. Patrice R. Dickey
United States Postal Service
Southern Regional Office
Memphis, Tennessee 38166-0120

Mr. Charles Nichols, Attorney at Law
P. O. Box 1687
Palestine, Texas 75802-1687

Mr. George A. Staples, Jr., Attorney at Law
701 Texas Commerce Building
860 Airport Freeway, West
Hurst, Texas 76054-3297

Barry R. Knight
James David Brown
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

/s/ BILLY H. GRAGG
Billy H. Gragg

APPENDIX III

Order of the Federal District Court denying Motion for Reconsideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-88-106-CA

THE CITY OF PALESTINE, TEXAS

v.

THE TEXAS FRUIT PALACE, INC.

v.

THE UNITED STATES POSTAL SERVICE
and UNITED STATES OF AMERICA

(Filed May 5, 1989)

ORDER

On this day came on for consideration the Motion of the Texas Fruit Palace, Inc., to Reconsider the Court's order issued on April 13, 1989, which severed and remanded the action between the City of Palestine and the Texas Fruit Palace. After due consideration, the Court is of the opinion that the Motion to Reconsider should be denied. It is, therefore,

ORDERED that the Texas Fruit Palace's Motion to Reconsider be and it hereby is in all things DENIED.

SIGNED this 4th day of May, 1989.

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX IV

Petition for Mandamus.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. _____

IN RE: THE TEXAS FRUIT PALACE, INC.,
Petitioner

PETITION FOR WRIT OF MANDAMUS

To The Honorable United States Court of Appeals:

The above named petitioner, The Texas Fruit Palace, Inc., herein applies, pursuant to Section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus directed to respondent, the Honorable William M. Steger, Judge of the United States District Court for the Eastern District of Texas. In support of this application, petitioner states:

I. ORDER AND OPINION BELOW

On April 13, 1989, respondent duly made and entered an order severing the action between The Texas Fruit Palace, Inc. (TFP), the United States Postal Service (USPS) and the United States of America (US) from the action between TFP and the City of Palestine, Texas (City) and remanding the action between TFP and the City to state court for a determination of state law issues. Such order is set forth in full as Exhibit "A", which Exhibit "A" is attached hereto and by reference is incorporated herein.

II. STATEMENT OF FACTS

The facts necessary to an understanding of the issue presented by this application are as follows:

TFP was organized for the purpose of encouraging agriculture and horticulture, and the maintenance of public fairs and exhibition of livestock and farm products. In 1947, the City leased 13.93 acres to TFP for a period of 50 years. In 1952, the lease was extended by agreement of the City and TFP to expire in the year 2007. In 1980, the City filed suit against TFP, alleging breach of the lease and requesting a declaration that the lease be cancelled. During the pendency of the City's cause of action, the City condemned TFP's leasehold estate for the purpose of conveying a portion to the United States Postal Service (USPS) and for use of the remainder for City purposes. TFP contested the City's condemnation proceeding on the grounds that:

1. The condemnation was made in bad faith;

2. The condemnation was contrary to the constitution of the United States under *Kohl v. U.S.*, 91 U.S. 367, 23 L.Ed. 449;

3. The City did not have funds to finance the condemnation as required by law; and

4. TFP was fulfilling a public purpose and there was no determination that the proposed public use was superior as required by law.

The City conveyed 7.02 acres to USPS, which prior to conveyance, was placed on notice that TFP contested the City's attempt to cancel the lease and to condemn the leasehold estate. The condemnation proceeding and the

proceeding to declare the lease breached were consolidated for purposes of trial. Following the conveyance to USPS, TFP impleaded USPS as a third party defendant pursuant to 28 U.S.C., Sec. 2409a, the Quiet Title Statute, so that TFP could obtain complete relief. (The United States was later impleaded as a third party defendant). USPS removed the consolidated cases to the U. S. District Court for the Eastern District of Texas. On April 10, 1989, the Court commenced jury trial of the proceeding. At the conclusion of the City's case, the Judge halted the proceedings, advising that an order would issue severing the cause of action and remanding that portion of the cause of action involving claims between the City and TFP to the state court for trial. Jurisdiction was retained in federal court over the remainder of the cause of action involving TFP's claims against the United States and USPS pending final judgment in the state court proceeding. On April 13, 1989, the Judge entered an order on the ruling.

III. STATEMENT OF ISSUE PRESENTED

The issue presented herein is as follows:

Where the USPS, a third party defendant in a quiet title action, removes the case to U. S. District Court, does the grant of exclusive federal jurisdiction (28 U.S.C., Sec. 1346(f)) for quiet title actions (28 U.S.C., Sec. 2409a) permit severance and remand of all parties, except USPS and the US to state court for a determination of the title, through which USPS and the US claim?

IV. STATEMENT OF RELIEF SOUGHT

The relief sought by petitioner herein is as follows:

A writ of mandamus directing the District Court to vacate the order of April 13, 1989 severing the action between TFP, USPS and the US from the action between TFP and the City and remanding the action between TFP and the City to state court for a determination of state law issues.

V. REASONS WHY WRIT SHOULD ISSUE

The reasons the writ requested herein should issue are as follows:

1. Title 28 U.S.C., Sec. 1346(f) grants the United States District Courts exclusive jurisdiction over the entire civil action in quiet title actions under 28 U.S.C., Sec. 2409(a) as determined by the case of *Key v. Wise,* 629 F.2d 1049 (C.A. 5, 1980) cert. den. 454 U.S. 1103.

2. All parties to this proceeding are necessary parties for a complete adjudication under state law and Rule 19(a) of the Federal Rules of Civil Procedure.

3. Severance and remand potentially subject TFP to a multiplicity of suits and inconsistent results.

WHEREFORE, petitioner respectfully prays that a writ of mandamus be issued by this court directed to respondent, the Honorable William M. Steger, Judge of the United States District Court for the Eastern District of Texas to vacate the order of April 13, 1989 severing the action between TFP and USPS and US from the action between TFP and the City and remanding the action between TFP and the City to state court for a determination of state law issues, and for such other and further relief as the court may deem proper.

BILLY H. GRAGG
P. O. Box 678
Palestine, Texas 75802
(214) 729-7333
State Bar No. 08253000

CHRISTOPHER J. KOLSTAD
P. O. Box 1668
Palestine, Texas 75801
(214) 723-3650
State Bar No. 11669500

RICHARD BROOKS HARDEE
Rt. 8, Hardee Bldg.
Hwy. 155, South
Tyler, Texas 75703
(214) 581-5220
State Bar No. 08952000

Attorneys for The Texas Fruit Palace, Inc.

CERTIFICATE OF SERVICE

I, RICHARD BROOKS HARDEE, do hereby certify that on this the 21st day of April, 1989, I served a copy of the foregoing PETITION FOR WRIT OF MANDAMUS, the original of which is being filed with the United States Court of Appeals for the Fifth Circuit, upon:

The Honorable William M. Steger
United States District Judge
United States Courthouse
211 West Ferguson
Tyler, Texas 75702

Mr. Dane Smith
Assistant U. S. Attorney
NCNB Center Tower
110 North College, Suite 600
Tyler, Texas 75702

Mr. Charles Nichols
Attorney at Law
P. O. Box 1687
Palestine, Texas 75801

Mr. George A. Staples, Jr.
Attorney at Law
701 Texas Commerce Bldg.
860 Airport Freeway, West
Hurst, Texas 76054-3297

Ms. Patrice R. Dickey
United States Postal Service
Southern Regional Office
Memphis, Tennessee 38166-0120

Mr. Barry R. Knight
Mr. James David Brown
Winstead, McGuire, Sechrest & Minick
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

by mailing the same to them as shown above.

RICHARD BROOKS HARDEE

APPENDIX V

Order of the Court of Appeals for the Fifth Circuit Denying Petition for Writ of Mandamus.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2393

IN RE: THE TEXAS FRUIT PALACE, INC.,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

---

(Filed April 27, 1989)

Before POLITZ, KING and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

APPENDIX VI

Motion for Rehearing of the Petition for Writ of Mandamus.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2393

IN RE: THE TEXAS FRUIT PALACE, INC.,
Petitioner

(Filed May 11, 1989)

MOTION FOR REHEARING OF THE PETITION FOR WRIT OF MANDAMUS

To The Honorable United States Court of Appeals:

The above named petitioner, The Texas Fruit Palace, Inc., hereby moves the Court for rehearing of the Petition for Writ of Mandamus pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and in support of this motion, petitioner states:

I.

On April 24, 1989, the petitioner filed for a writ to mandamus the United States District Court for the Eastern District of Texas. This court denied the writ by order dated April 27, 1989.

II.

The state court decision in the remanded portion of case between the non-federal parties will be res judicata

as to the United States and the United States Postal Service under this court's decision in *Key v. Wise,* 629 F.2d 1049 (C.A. 5 1980) cert. den. 454 U.S. 1103. The effect of severing and remanding to state court that portion of the case involving non-federal parties is set forth in the petitioner's attached memorandum brief.

III.

Title 28, U.S.C., Sec. 1346(f) and 2409a grants exclusive jurisdiction over the case to the U. S. District Court in which it is pending. This court held that the grant of jurisdiction to federal court under these statutes "gave that court exclusive jurisdiction over the entire civil action and not merely over the claim against the United States." *Key v. Wise,* supra, at Pg. 1057. This court's decision that the jurisdictional grant is exclusive is more fully set forth in the attached memorandum of authorities.

WHEREFORE, petitioner moves this court to grant the motion for rehearing, and upon rehearing, to grant the writ of mandamus.

BILLY H. GRAGG
P. O. Box 678
Palestine, Texas 75802
(214) 729-7333
State Bar No. 08253000

CHRISTOPHER J. KOLSTAD
P. O. Box 1668
Palestine, Texas 75801
(214) 723-3650
State Bar No. 11669500

/s/ RICHARD BROOKS HARDEE
Richard Brooks Hardee
Rt. 8, Hardee Bldg.
Hwy. 155, South
Tyler, Texas 75703
(214) 581-5220
State Bar No. 08952000

Attorneys for The Texas Fruit Palace, Inc.

CERTIFICATE OF SERVICE

I, RICHARD BROOKS HARDEE, do hereby certify that on this the 8th day of May, 1989, I served a copy of the foregoing Motion for Rehearing of the Petition for Writ of Mandamus, the original of which is being filed with the United States Court of Appeals for the Fifth Circuit, upon:

The Honorable William M. Steger
United States District Judge
United States Courthouse
211 West Ferguson
Tyler, Texas 75702

Mr. Dane Smith
Assistant U. S. Attorney
NCNB Center Tower
110 North College, Suite 600
Tyler, Texas 75702

Mr. Charles Nichols
Attorney at Law
P. O. Box 1687
Palestine, Texas 75801

Mr. George A. Staples, Jr.
Attorney at Law
701 Texas Commerce Bldg.
860 Airport Freeway West
Hurst, Texas 76054-3297

Ms. Patrice R. Dickey
United States Postal Service
Southern Regional Office
Memphis, Tennessee 38166-0120

Mr. Barry R. Knight
Mr. James David Brown
Winstead, McGuire, Sechrest & Minick
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

by mailing the same to them as shown above.

/s/ RICHARD BROOKS HARDEE
Richard Brooks Hardee

APPENDIX VII

Order denying Motion for Reconsideration of Court Order Denying Petition for Writ of Mandamus

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2393

IN RE: THE TEXAS FRUIT PALACE, INC.,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

---

(Filed May 15, 1989)

Before POLITZ, KING and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of this Court's order of April 27, 1989 denying its petition for writ of mandamus is DENIED.

APPENDIX VIII

Trial Pleadings of TFP (Exhibits thereto omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TY-88-106-CA

CITY OF PALESTINE, TEXAS

v.

THE TEXAS FRUIT PALACE

v.

THE UNITED STATES POSTAL SERVICE

THIRD AMENDED OBJECTION TO AWARD OF COMMISSIONERS AND MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

To The Honorable Judge of Said Court:

Defendant in the above styled proceedings in eminent domain objects to the proceedings in their totality as being illegal and unauthorized by law, and void on their face; as being capricious and entered into in bad faith; and in the alternative, if defendant has misconstrued its rights the damages were inadequate and not assessed in accordance with the law.

In support of the foregoing Defendant would respectfully show the Court that:

I.

THE PARTIES AND THE LAND

1.1. DEFENDANT: The Texas Fruit Palace, Inc., is the defendant and condemnee and is a non-profit corporation organized under the laws of the State of Texas. It operates what is commonly known as the Anderson County Fair, and is sometimes hereinafter referred to as "the Fair". The land in controversy constitutes 13.034 acres, more or less, situated within the boundaries of the above municipality. The condemnee claims right thereto by virtue of a lease dated the 24th day of February, 1947, and extended by amendment to the 25th day of February, 1952, the term of which expires in the year 2007.

1.2. PLAINTIFF: The plaintiff, the condemnor, the City of Palestine is a municipality organized as a Home Rule City under the laws of the State of Texas. Service should be had upon City by issuing the same to its Mayor and its City Council as follows:

1. The City of Palestine which may be served at the City Hall of the City of Palestine.
2. The Honorable Jack K. Selden, Jr., Mayor of the City of Palestine, who may be served at the City Hall.
3. Mrs. Connie Calloway, who may be served at the City Hall.
4. Mr. Danny Allison, who may be served at the City Hall.
5. Mr. Jack A. Coleman, Jr., who may be served at the City Hall.

6. Mr. R. E. Wearden, who may be served at the City Hall.
7. Mr. Willie Myers, who may be served at the City Hall.
8. Mr. Arthur Sherrod, who may be served at the City Hall.

Service should be had on said City and each of its above-named officials.

Subsequent to the filing of condemnee's original "Objection to Award of Commissioners and Motion for Temporary Restraining Order and Injunctive Relief," the condemnor took possession of the premises and conveyed a portion thereof to the United States Postal Service by deed dated the 14th day of October, 1987 and recorded in Vol. 1175, pg. 715 of the Land Records of Anderson County, Texas, which Service condemnee hereby joins in this action.

The United States of America and/or the United Postal Service should be and are hereby joined in this cause. The United States Postal Service is an independent establishment of the government of the United States, which under 39 U.S.C. § 4011 may be sued in its official name. The United States Postal Service, was acting as an establishment of the government of the United States. The United States is joined pursuant to 28 U.S.C. § 1441, 28 U.S.C. 2409a, 28 U.S.C. 1339 and 28 U.S.C. 1346(f).

II.

RESTRAINING ORDER AND INJUNCTION

2.1. CONDEMNING ACT: On the 9th day of March, 1987, the condemnor, City, passed a resolution authoriz-

ing the institution of proceedings for the condemnation of the interest of defendant-condemnee in said premises for the purpose of "acquiring the land to sell to the United States government for the placement of a new postal facility." Subsequently, on the 22nd day of June, 1987, the Council passed a second resolution stating the purposes of such condemnation to be for the purposes of conveying a portion of said property to the United States government for a regional postal facility. "Further . . . [for] city offices, city warehouses, city equipment barn, city maintenance garage, city storage yard, city indoor storage buildings, parking facilities, and streets and alleys." Proceedings were commenced by the condemnor filing a "Plaintiff's Statement" in the 3rd Judicial District Court on the 26th day of June, 1987, and condemnee was served with formal notice thereof on the 2nd day of July, 1987.

James L. Boone, Jr., Tom Broyles, and Cordell White were appointed special commissioners. The commissioners set the value of the property at $160,000.00. The award of the commissioners was filed on July 27, 1987. Not only is the amount woefully inadequate, but the meeting of said commissioners and all their acts are void in their entirety and contrary to the Constitution of the United States and of the State of Texas, as is more fully hereinafter set forth.

2.2. EXCLUSIVELY FEDERAL FUNCTION: The Postal Authority is a public and governmental function delegated exclusively to the United States by the Federal Constitution and that government has a monopoly thereon. U. S. CONST. art. I § 8 Clause 7, 39 U.S.C. § 1 et seq. The taking of property through a claim of eminent

domain is contrary to said constitutional and statutory authority and is invalid, void and illegal. Despite such fact defendant as is above alleged notified plaintiff by letter under date of April 28, 1987, as set forth in Exhibit "A" attached hereto, that unless plaintiff agreed to the payment therein offered condemnation proceedings would be commenced and their property taken by eminent domain. In furtherance of said purpose the City Council of said City adopted a resolution authorizing the acquisition of said property as above set forth, as evidenced by Exhibit "B" attached hereto.

In addition to being violative of said art. I, § 8, the taking of the property in violation of said Article would constitute a denial of due process of law to this defendant under the V and XIV amendments of the Constitution of the United States.

2.3. NOT A STATE FUNCTION. The State of Texas, together with its various political subdivisions, has no authority to appropriate land for the use of a sovereign other than itself, except to the extent that the use to which the appropriated land is to be put is a use in furtherance of a public function of such state. The use of land for a post office is not for a use which can be exercised by the State of Texas, or its political subdivisions, specifically including the City of Palestine, condemnor herein, and any attempt to exercise the right of eminent domain for such purpose is invalid, void, and illegal.

Further the taking of the property of defendant in contravention of said constitutions would be a violation of the rights, privileges and immunities secured this

defendant under the TEX. CONST. art. I, §§ 17 and 19, and of the U.S. CONST. Amend. V and XIV.

2.4. COMPENSATION INADEQUATE. Condemnee is informed and believes and thereon alleges that the provisions for compensation made by the City are based on an erroneous measure damages, namely, market value, whereas the property of condemnee has a distinct and unique value and as such the proper measure of damages to which condemnee is entitled is replacement and reconstruction cost thereof, and since provision for compensation of the former is much less than the latter, said provisions are woefully inadequate and under such circumstances there would be no just or adequate compensation as required by the Constitution of the United States Amendment V and the Constitution of the State of Texas, art. I, § 17, respectively.

The facilities in the aggregate may not be properly viewed as individual improvements, but as a unique group of facilities integrated for the specific purpose of holding fairs, and no comparable aggregation of facilities are traded or available upon which to establish a market and arrive at a fair market value.

The improvements for which such replacement compensation should be had include a main exhibit building made of concrete block and a concrete floor with dimensions of approximately 100 x 180 feet; other buildings and their approximate size are two hog barns which are 30 x 60 feet each, and one 20 x 60 feet, a rabbit and poultry barn also 30 x 60 feet, a livestock barn 100 x 110 feet, an open arena 128 x 250 feet, some 10 concession booths, some of which have concrete floors and storage rooms (and some of which are owned by condemnee and

some of which by the Lions Club, the First Baptist Church and other similar organizations) all of which are served by the piping and wiring necessary to provide water and electric service to such facilities spread over some 13.034 acres, more or less.

Condemnee would further show that the taking of said property without affording condemnee compensation sufficient to replace the same would in effect be a taking of the entire business of providing fairs for the public. Cessation in the performance of condemnee's corporate purpose would in reasonable likelihood cause condemnee pursuant to Articles "Eighth" and "Ninth" of condemnee's Articles of Incorporation, attached hereto as Exhibit "C", to distribute its assets to an organization qualifying (as does condemnee) under I.R.C. 501(c), because it would not have the wherewithal to construct the facilities requisite to its continued operation as required by its Articles, and thus constitutes a taking of both the real and personal property of condemnee.

The value of such replacement cost is not presently known to condemnee, but the same would conservatively be at least $400,000-$500,000 plus the cost of replacement land.

Pleading further as to the inadequate provisions for compensation made by the City, this condemnee is informed and believes and thereon alleges that provision for payment is in any event contingent upon the hope for receipt of purchase funds from the Postal Service and that in the absence of such receipt the funds of the City are inadequate for the payment of even the depreciated value of such property.

2.5. CONDEMNATION OF A LEASEHOLD ESTATE. The condemnor seeks to condemn a leasehold estate, which is in law personal property, and should condemnee have misconstrued its rights to the replacement cost of the property as property incapable of having a market value placed thereon, then in that event, condemnee states that he is entitled to the cost of moving that personal property appurtenant to such lease, which includes all buildings and improvements on the premises, pursuant to the Texas Property Code § 21.043, which is the replacement value of said improvements and that the damages to its leasehold estate equals the value of the replacement cost of the land and facilities necessary to carry on the corporate purposes—i.e., the cost of land and $400,000-$500,000.

2.6. BAD FAITH: The present condemnation effort was entered into in bad faith. The condemnor has attempted to declare the lease void and to oust the condemnee for approximately nine years. The first attempt was made in 1978 when the City gave the Fair notice that it considered the lease void and that it was making plans to erect a civic auditorium on the premises. The Fair obtained a temporary restraining order issued out of the District Court of the Third Judicial District of Texas, dated the 4th day of December, 1978, in Cause No. 31,861. Subsequently the Fair and the City reached an agreement for the joint use of the premises, but the City later decided to build the civic auditorium elsewhere and the parties mutually agreed to rescind the agreement and entered a written instrument to that effect.

In 1980 the City once again notified the Fair, despite express reaffirmations of the lease in the re-assignment referred to in the paragraph immediately preceding, that

it considered the lease terminated and in December 1980, instituted a suit seeking, inter alia, a judgment to that effect, Cause No. 32,681 in the 3rd Judicial District of Texas.

Both parties moved for summary judgment on multiple grounds and that of the condemnee herein was in all things granted and that of the City in all things denied. Both parties appealed. The Court of Appeals for the 12th Judicial District of Texas reversed in an unpublished opinion dated April 25, 1986, attached hereto as Exhibit "D". The Supreme Court declined to hear the case n.r.e. Said cause is once more before the District Court of Anderson County, Texas, and awaits hearing.

It is clear that condemnor's efforts to condemn the property for postal purposes is but a subterfuge to extricate themselves from a lease that they have found not to their liking, and that they hope to gain the premises through eminent domain, sell a portion to the Postal Service, and have the remaining portion of the land for their own unidentified use or speculative commercial purposes. Said condemnation is made fraudulently and in bad faith.

Further, such a procedure is void and without effect and is in contravention of the Constitution of the State of Texas, art. I §§ 17 and 19, and denies to condemnee the rights, privileges, and immunities secured it under the Constitution of the United States, Amendments V and XIV.

2.7. FAILURE TO COMPLY WITH SECTION 21.012 PROPERTY CODE. Section 21.012 of the Texas Property Code provides in applicable part that the condemnation petition must "(2) state the purpose for which the

entity intends to use the property." The City of Palestine's petition in condemnation states that the purpose is "to convey a portion of the property to the United States Government for a regional postal facility, and for the location of city offices, city warehouses, city equipment barns, city maintenance garages, city storage yards, city indoor storage buildings, parking facilities, and streets and alleys." City of Palestine Resolution Number R-30-87 authorizes the acquistion of the property described in the condemnor's petition for conveyance of fee simple title to the United States. A copy of the resolution is attached hereto as Exhibit "B" and incorporated herein by reference. The purpose of the acquistion of the property set forth in the City's resolution is at variance with the purpose set forth in the condemnor's petition. The City of Palestine has failed to comply with Section 21.012 of the Property Code by the failure to state the purpose for which the entity intends to use offices, city warehouses, city equipment barns, city maintenance garages, city storage yards, city indoor storage buildings, parking facilities, and streets and alleys." City of Palestine Resolution Number R-30-87 authorizes the acquistion of the property described in the condemnor's petition for conveyance of fee simple title to the United States. A copy of the resolution is attached hereto as Exhibit "B" and incorporated herein by reference. The purpose of the acquisition of the property set forth in the City's resolution is at variance with the purpose set forth in the condemnor's petition. The City of Palestine has failed to comply with Section 21.012 of the Property Code by the failure to state the purpose for which the entity intends to use the property as set forth in the condemnor's petition, then the condemnee alternatively alleges that

the City of Palestine has not authorized the condemnation of the property for the purposes set forth therein. Conversely, if the City intends to condemn the property for the purpose set forth in Resolution R-30-87, the condemnor's petition does not correctly set forth the purpose for which the City of Palestine intends to use the property.

2.8. SECOND RESOLUTION. Subsequently, as stated in Count II above, on June 22, 1987, the Council passed R-37-87 Ex. "E" and added to the stated purposes of taking the premises, "Further, public convenience and necessity requires that possession of the property be acquired free and clear of any encumbrances for the following public purposes: city offices, city warehouse, city equipment barn, city maintenance garage, city storage yard, city indoor storage buildings, parking facilities, and streets and alleys." The second resolution was passed subsequent to the condemnee's having sought to contest the validity of the City's condemnation on behalf of the Federal government as being violative of art. I Sec. 8 of the Constitution of the United States as set forth above in the United States District Court for the Eastern District of Texas (TY-87-185-CA), but the Court declined jurisdiction, by order dated June 15, 1987. This second resolution is a veiled attempt to breathe life into a fatally defective proceeding, is made in bad faith, and is of no force and effect.

2.9. PROPERTY DEDICATED TO PUBLIC USE. That which the City seeks to condemn is dedicated to public use.

The Texas Fruit Palace, Inc., as afore alleged, is a non-profit corporation, the sole corporate authority of which is the encouragement of agriculture, horticulture,

and the maintenance of public fairs, and exhibitions of livestock and farm products. (See Articles of Incorporation, Article Second, Ex. "C"). Governmental entities, including municipalities, may appropriate public funds only for public purposes, which may include the promotion of exhibitions, fairs and organizations devoted to the growth of the community and the development of its industry, agriculture and public purposes in general.

The lease executed between the City and condemnee imposes upon condemnee the obligation to hold public fairs and exhibitions on the land owned by the City as a requisite to maintaining said lease. No part of the net earnings of the condemnee corporation can, under its Charter, (see Article Eight of Exhibit "C" attached) inure to the benefit of or is distributable to its members, trustees, officers, or other private persons.

The City under law is prohibited from taking property already dedicated to a public use unless it be shown that the new use, or in the instant case, each of the proposed new uses, is paramount to the public use to which said property is presently dedicated.

III.

DEVELOPMENT SINCE HEARING FOR TEMPORARY RELIEF AND PRAYER FOR ADDITIONAL RELIEF

3.1. CONVEYANCE TO POSTAL SERVICE. Furthermore, acting in concert with the Postal Service, said Service and the City of Palestine entered into a binding contract on April 7, 1987, when the Postal Service, in a letter of that date, accepted and made binding an irrevocable offer made to it by condemnor the Service's

Form 7432, (see Ex. "G") committing said City to deliver to it some 6.50 acs. to 9.20 acs. At the time of said acceptance the Postal Service had full knowledge that the Texas Fruit Palace claimed a leasehold estate on said premises and had valuable improvements thereon. With the concurrence and collaboration of the Postal Service the City was thus assured of sufficient funds to condemn the property of condemnee. The City made (or has purported to make) the conveyance to the Postal Service of 7.0253 acres of the premises by deed executed by its City Attorney, Charles W. Nichols, on the 14th day of October, 1987 and recorded in Vol. 1175, pg. 715, Land Records of Anderson County, Texas, as stated in Count I above.

Even had the City acted in good faith, which condemnee denies, in seeking to condemn the property of condemnee, it is apparent that the 13.034 acs. constituting the leasehold of condemnee was far in excess of property needed by the City for its avowed purposes and that had the City pursued its purpose without the concurrence of the Postal Service it would have been relegated to condemning only a portion of the leasehold estate and thereby incurring the possibility of having severance damages assessed against it which could reasonably be expected to be far in excess of the fair market value of the property alone, which is the standard of compensation which the City hoped to impose.

The net results to date of such scheme is that the City has placed $160,000 in the Registry of this Court pursuant to the award of the special commissioners appointed by the Honorable Judge of such Court. It has entered upon the property of condemnee and conveyed 7.0253 acs. of the 13.034 acs. to the Postal Service of

the United States, and received from the Postal Service $226,458.00 in consideration for said conveyance.

Thus, the City has seized under color of law all of condemnee's leasehold estate, made a profit of $66,458.00 and has 6.0087 acs., more or less, plus the improvements thereon, at no cost.

3.2. TRESPASS. Said entry is illegal and contrary to law and constitutes a trespass for which condemnor is liable in law for all damages caused to the property during their occupancy thereof, the exact amount of which is not currently known to condemnee, but which damages continue to occur, plus the reasonable loss of profits occasioned by the fact that said occupancy prohibited and made it impossible for condemnee to hold its annual Fair in May of 1987, and because the trespass was made in bad faith the condemnee is entitled to exemplary damages.

3.3. VIOLATION OF CONSTITUTION AND CIVIL RIGHTS ACT. In carrying out each of the above actions, as set forth in this petition, of which complaint is made, the City was acting under color of law, including the condemnation statutes of the State of Texas and under color of its Ordinance, and as a result of such acts condemnee has been deprived of rights, privileges, and immunities secured to it by virtue of art. I, Sec. 8 of the Constitution of the United States and under the 5th and 14th amendments to said Constitution all as afore-plead; and further said actions constitute a deprivation of said rights of the condemnee under 41 U.S.C.S. § 1983, known as the Civil Rights Act.

The condemnee, as a result of the above actions and deprivations is entitled (a) to a Writ of Possession re-

storing its leasehold estate to the condemnee, (b) to damages done by the City and its assigns during any occupancy, (the exact nature and amount of which are at this time unknown to condemnee) or in the alternative to damages measured by the replacement cost of its facilities in an amount of at least $500,000.00 plus the cost of premises adequate to accommodate said facilities, and (c) to exemplary damages in the amount equal to at least 10% of the actual damages found but in no event less than $50,000, plus reasonable attorneys' fees.

3.4. MANDATORY INJUNCTION BASED ON DENIAL OF TEMPORARY RELIEF. The condemnee while insisting upon the propriety of the temporary relief for which it has previously prayed, and in no wise waiving any rights thereunder, prays now that the temporary restraining order and injunction seeking to prohibit the City from entering upon the premises, in the light of the action of this Honorable Tribunal in denying the temporary relief sought, now be made a mandatory injunction ordering said City to vacate the premises, and in support of said mandatory injunction condemnee be issued a Writ of Possession.

IV.

UNITED STATES POSTAL SERVICE AS A PARTY

4.1. CLOUD ON TITLE. As a result of the conveyance to the Postal Service as set forth in Count III, 3.1. above a cloud has been placed upon the estate and leasehold interest of condemnee, and said deed to the Postal Service should be cancelled by the Court. The Postal Service took no title to the property because of the matters above plead, all of which were known to the Postal Service as herein plead.

4.2. CLOUD ON TITLE. The recording of the deed constitutes a slander of condemnee's rights in the property. Furthermore, at the time said deed was accepted the Postal Service had full knowledge; that the condemnee claimed a valid leasehold estate on the premises; that in some eight years of litigation the City of Palestine, condemnor, had been unsuccessful in its attempt to oust condemnor; that a second suit (being the litigation herein) was pending wherein both the good faith and the constitutionality of the taking were in issue; that the concert action and collaboration of the Postal Service was necessary in order for the City of Palestine to carry out its illegal and unconstitutional design in that the Postal Service had been advised at least as early as December of 1986 that the Postal Services' funds were necessary in order for the City to carry out the condemnation, since the City of Palestine had no front money to carry the project for other than possibly a short period.

The action of the Postal Service constitutes such wilful, wanton, and deliberate indifference to the rights of condemnee as to entitle condemnee to both actual and exemplary damages, as well as to reasonable attorneys' fees. The condemnee is entitled to actual damages in an amount equal to the physical damage done to its premises by the Postal Service, the exact nature and extent of which is presently unknown to condemnee, to reasonable attorneys' fees, and to exemplary damages in amount of at least $50,000.

4.3. CONCURRENT ACTION OF POSTAL SERVICE. As set forth in the Count immediately preceding, the City advised the Postal Service that the funding of

the Service was necessary for it to have sufficient funds to effectuate the condemnation. But for the concurrent action and cooperation of the Postal Service the City could not have ousted condemnee from its property, and the ouster of condemnee was a proximate result of such action and cooperation all to the detriment of condemnee, all of which was known or should have been known to the Postal Service. The Postal Service is, therefore, equally liable with the City for all awards and damages assessed against it and condemnee prays the Court for judgment requiring such contribution.

4.4. DEED INVALID. Further, the deed to the Postal Service is invalid in that it is executed by Mr. Charles W. Nichols, City Attorney for said City. The City Charter of such City delegates authority to the City Manager, "(e) To execute deeds, deeds of trust, easements, releases, and all other legal instruments on behalf of the City when authorized by ordinance or resolution of the City Council." No similar authority is delegated to the City Attorney by said Charter and any attempt of the City Council to delegate such authority to him, or for him to attempt and exercise the same is void and without authority of law.

4.5. NON-COMPLIANCE WITH EXECUTIVE ORDER. In addition to the above condemnee would further show that the Deed of the Postal Service should be cancelled due to the fact the Postal Service selected and chose the site in question in an illegal way and contrary to law. Executive Order 12072, 43 FR 36869, a copy of which is attached hereto as Exhibit "H", also known as the "PRESIDENT'S URBAN POLICY" provides that in the process for meeting federal space needs in urban

areas first consideration shall be given to the centralized community business area and adjacent areas of similar character. Neither the "Advertisement for Sites" attached as Exhibit "F" nor the form upon which irrevocable offers were made (Form 7432) attached as Exhibit "G" in any way attempt to implement the PRESIDENT'S URBAN POLICY. The only site preference stated was along or adjacent to Loop 256 (or extensions thereof). Although said loop circumscribes the downtown business district of the City of Palestine, sites along said Loop can in no wise properly be considered in the centralized community business area or an adjacent area of similar character.

WHEREFORE CONDEMNEE PRAYS THAT:

1. As to the City of Palestine:

   (a) a Mandatory Injunction issue together with a Writ of Possession restoring to condemnee possession of the premises;

   (b) damages done to the premises during the trespass of condemnor be awarded to condemnee, together with exemplary damages equal to at least 10% of the actual damages but in no event less than $50,000;

   (c) for the violation of the civil rights of condemnee, condemnee be awarded exemplary damages of at least $50,000, plus reasonable attorneys' fees;

2. As to the United States and/or the United States Postal Service:

(a) a Writ of Possession restoring to condemnee possession of the premises;

(b) all damages done by the Postal Services to the premises during its occupancy;

(c) exemplary damages in the amount of $50,-000 for the slander of condemnee's leasehold interest, plus reasonable attorneys' fees; and

(d) a contribution to the award entered against the City as the Court might deem just; and

3. To any and all other relief above prayed for together with cost of court and such other and additional relief to which condemnee might be entitled.

/s/ BILLY H. GRAGG
Billy H. Gragg
P. O. Box 678
Palestine, TX 75801
214/729-7333

/s/ CHRISTOPHER J. KOLSTAD
Christopher J. Kolstad
P. O. Box 1668
Palestine, TX 75801
214/723-3650

/s/ R. BROOKS HARDEE
R. Brooks Hardee
Rt. 8, Hardee Bldg.
Hwy. 155, South
Tyler, TX 75703

Attorneys for Condemnee

VERIFICATION

STATE OF TEXAS §

COUNTY OF ANDERSON §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Billy H. Gragg, who being by me duly sworn on his oath deposed and said that he is the attorney of record for The Texas Fruit Palace, Inc., in the above-entitled and numbered cause; is authorized to sign this affidavit; that he has read the above and foregoing Third Amended Objection to Award of Commissioners and Motion for Temporary Restraining Order and Injunctive Relief; and Mandatory Relief; and that every statement contained therein is within his personal knowledge and true and correct.

/s/ BILLY H. GRAGG
Billy H. Gragg

SUBSCRIBED AND SWORN TO BEFORE ME on the 29th day of September, 1988, to certify which witness my hand and official seal.

/s/ MATTIE BELLE BARBER
Notary Public

My Commission Expires: 6-30-92

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Third Amended Objection to Award of Commissioners and Motion for Temporary Restraining Order and Injunctive Relief has been mailed by Certified U. S. Mail, postage prepaid on this 3rd day of October, 1988, as follows:

George Staples, Attorney at Law
701 Texas Commerce Bank Bldg.
Hurst, TX 76054

Charles W. Nichols, Attorney at Law
P. O. Box 1687, Palestine, TX 75801

/s/ BILLY H. GRAGG
Billy H. Gragg

APPENDIX IX

Order of the United States District Court for the Eastern District of Texas, Tyler Division of June 15, 1987 Denying Injunctive Relief to TFP.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. TY-87-185-CA

TEXAS FRUIT PALACE, INC.,
Plaintiff,

v.

CITY OF PALESTINE, TEXAS,
Defendant.

(Filed June 15, 1987)

ORDER

Plaintiff Texas Fruit Palace, Inc. (TFP), filed the above-entitled and numbered civil action on May 22, 1987, demanding a temporary restraining order and a preliminary and permanent injunction. The demand for a temporary restraining order was denied at an in-chambers conference held the afternoon that the civil action was instituted. On June 3, 1987, a hearing was conducted relevant to the propriety of granting a preliminary injunction. As more fully set forth below, TFP possesses an adequate remedy at law, making preliminary or permanent injunctive relief inappropriate. Furthermore, because TFP has requested only equitable relief in this

lawsuit, and all such relief has been denied, this civil action must be dismissed.

At issue in the present dispute is the authority of defendant City of Palestine (City) to utilize its power of eminent domain against a leasehold interest owned by TFP. The City owns fee simple title to the land in question. Since 1952, pursuant to a fifty-year lease, TFP used the land to provide a location for an annual county fair. The City and TFP have disputed the amount of rent owing under the lease since 1978. The City filed suit in the District Court of Anderson County, Third Judicial District of Texas, where summary judgment was granted in favor of the City's interpretation of the lease. However, the Court of Appeals for the Twelfth Supreme Judicial District of Texas reversed and remanded the cause for trial.[1]* Pending trial in state district court, TFP came to believe that the City intended to sell the land in question to the United States Postal Service for construction of a post office.[2] TFP filed this action seeking to enjoin any condemnation activity by the City against TFP's leasehold in furtherance of the contemplated sale of land.[3]

TFP's main contention is that the City lacks authority to procure land for a post office, because the federal

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1. *Texas Fruit Palace, Inc. v. City of Palestine,* No. 32,681 (Tex. App.—Tyler, April 25, 1986, writ ref. n.r.e.) (unpublished decision).

* In the interest of accuracy it is noted that the occurrence was the opposite of that stated. TFP was granted the summary judgment and it was this decision that the appellate court reversed.

2. The parties have apparently agreed to delay their state court trial as a result of the potential sale.

3. The City asserts that no condemnation will occur until a buyer (*e.g.*, the United States Postal Service) is contracted to purchase the land. However, TFP has introduced evidence demonstrating that the threat of such condemnation is sufficiently crystalized so as to make the dispute ripe for adjudication.

government possesses exclusive authority in postal matters. Several nineteenth century decisions are offered as support for this position. In *Trombley v. Humphrey,* 43 Mich. 471 (1871), the Michigan Supreme Court held that the state of Michigan lacked the authority to condemn land for the express and exclusive purpose of transferring such property to the federal government for the construction of lighthouses. The foundation for the holding in *Trombley* is the doctrine that a state's sovereign power of eminent domain may not be utilized for the sole purpose of benefitting another sovereign entity, whether the other sovereignty be a state, the federal government, or a foreign nation. *Id.* at 475-476. The analysis in *Trombley* was adopted by the United States Supreme Court, as dictum in *Kohl v. United States,* 91 U.S. 367, 373-74 (1875): "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right." *See also Darlington v. United States,* 82 Pa. 382 (1877) (adopting the analysis in *Trombley*).

Whatever the merits of TFP's constitutional argument, the posture of the present dispute necessitates denial of TFP's demand for injunctive relief. As a preliminary matter, the City asserts that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal intervention in the state litigation at issue here. However, there is not currently a condemnation proceeding involving these parties. The demand that such proceedings be enjoined in the future does not run afoul of the Act, which prohibits interruption of extant, as opposed to threatened, state court proceedings. *See Dombrowski v. Pfister,* 380 U.S. 479, 484 n.2 (1964); 17 C. Wright, A. Miller & E.

Cooper, Federal Practice and Procedure § 4222 at 318 (1978). Moreover, an exception to the Anti-Injunction Act exists for actions brought under 42 U.S.C. § 1983. *See Mitchum v. Foster,* 407 U.S. 225 (1972); *Joiner v. City of Dallas,* 488 F.2d 519 (5th Cir. 1974). Because TFP's claim is directed toward alleged unconstitutional activity of the City, and could presumably be brought under 42 U.S.C. § 1983, the Anti-Injunction Act does not apply.

Nevertheless, injunctive relief shall not issue. A federal court, sitting in equity, may in its discretion grant preliminary or permanent injunctive relief only where there is a risk of irreparable harm, and there exists no adequate remedy at law. *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974). In this case, TFP may recover damages, if the City is eventually found to have condemned TFP's property rights in an unconstitutional or unauthorized manner. *See Matador Pipelines, Inc. v. Watson,* 626 S.W.2d 139, 141 (Tex. App.—Waco 1981, writ ref'd n.r.e.) (affirming award of actual and punitive damages for legally invalid condemnation). TFP's ability to obtain damages constitutes an adequate remedy at law, and undercuts the assertion of irreparable injury. *See Morgan v. Fletcher,* 518 F.2d 236, 239-40 (5th Cir. 1975) (reversing grant of preliminary injunction).

TFP asserts that it lacks an adequate remedy at law, because of the haste with which the threatened condemnation could take place. *See* plaintiff's brief, May 27, 1987, at 4-7; plaintiff's supplemental brief, June 10, 1987, at 5-8. It is true that, upon depositing the amount of money awarded by the condemnation commissioners, the condemnor is entitled to "take possession" of the property.

Tex. Prop. Code § 21.021(a)(1) (Vernon 1974).[4] However, it appears that full title to the property does not vest with condemnor until a final court judgment has been entered and the appellate process has been exhausted. *Id.* Under Texas law, the condemnee may contest in state district court both the authority of the condemning entity, and whether or not the condemnation is in furtherance of a valid public purpose. *See Housing Authority of City of Dallas v. Higginbotham,* 143 S.W. 2d 79 (Tex. 1940); *Tenngasco Gas Gathering Company v. Fischer,* 653 S.W.2d 469 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). TFP's constitutional arguments may be raised prior to the passing of title, or on appeal, thereby preserving the adequacy of TFP's remedy at law. *See Travis v. Pennyrile Rural Electric Cooperative,* 399 F.2d 726, 729 (6th Cir. 1968) (denying request for injunction against state condemnation proceeding). *See also Ahrensfeld v. Stephens,* 528 F.2d 193 (7th Cir. 1975) (federal constitutional objections to state court eminent domain proceedings could be raised in state court, thereby rendering injunctive relief inappropriate). Accordingly, it is

ORDERED that plaintiff's motion for preliminary and permanent injunction shall be, and it is hereby, DENIED. It is further

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4. It is not entirely clear whether the threatened condemnation would proceed under the general eminent domain procedures set out in Tex. Prop. Code Ann. § 21.001 *et seq.* (Vernon 1973), or under Tex. Rev. Civ. Stat. Ann. art. 5248e (Vernon 1962), which seems especially suited for municipalities seeking to condemn property for eventual transfer to the United States government. Under either statutory scheme, however, it is evident that TFP has ample opportunity to raise its constitutional arguments and seek damages.

ORDERED that the above-entitled and numbered civil action shall be, and it is hereby, DISMISSED.

SIGNED and ENTERED this 15th day of June, 1987.

/s/ W. I. WAYNE JUSTICE
Chief Judge